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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES,
Appellant,

AGAINST

THE UNITED VERDE COPPER COMPANY,
Appellee.

No 68.

Brief for United Verde Copper Company, Appellee, on Appeal from the Supreme Court of Arizona.

Statement of Facts in the Case.—This action was brought by the United States to recover $38,976.75, the alleged value of certain wood cut by one Rafael Lopez and sold to the defendant and used by it for the purpose of roasting ore.

The complaint alleges that Lopez is a resident of Arizona and that the defendant is a resident corporation; that the wood in question was cut from unsurveyed public mineral lands of the United States, situate in Arizona and sold to the defendant and then adds:

> "Plaintiff further alleges that the said timber was "used and consumed by the said defendant for the "purpose of roasting ore at the United Verde Copper

"mines, said mines being the property of defendant "herein, at Jerome, Yavapai County, Arizona Terri- "tory, in violation of the Act of Congress of June 3rd, "1878, and of the rules and regulations of the Secre- "tary of the Interior, promulgated under the author- "ity of said Act of Congress."

To this the defendant demurred on the ground that the complaint did not state a cause of action, and that the defendant had a right under the act to use the timber for roasting its ores. The demurrer was sustained by the District Court for the Fourth District of Arizona. Plaintiff declined to amend its complaint and thereupon appealed to the Supreme Court of the Territory of Arizona, which Court affirmed the decision below. The plaintiff now appeals to this Court.

It is claimed by appellant that the use of the timber is not only forbidden by the act itself, but that it is especially in contravention of Rule Seven of the Regulations of the Secretary of the Interior, which forbids the use of such timber for smelting. This appeal therefore presents these questions.

First.—Whether the words "for building, agricultural, mining and other domestic purposes," as used in the Act of June 3rd, 1878, are broad enough to include the acts of the defendant complained of; and,

Second.—Whether the rule promulgated by the Secretary of the Interior in 1900 forbidding the use of the timber in question for smelting constitutes a valid prohibition of its use for roasting ore.

The regulation referred to was not issued until the year 1900, twenty-two years after the passage of the Act, and

it is believed that up to the time of the commencement of this action in December, 1902, the right of miners to use government timber for roasting ore under the Act of 1878 had never been seriously questioned during the twenty-four preceding years except in the case of the *United States* v. *Richmond Mining Co.* 40 Fed. Rep. 415, decided in 1889, where the said right was upheld by the U. S. Circuit Court of Nevada.

The Arizona Supreme Court in the present case held in a well considered and exhaustive opinion that the process of smelting referred to by the Secretary did not include roasting, the latter being really a process of mining; that the practical, usual and ordinary meaning of the words mining and mining purposes should prevail in the construction of the act rather than any narrow meaning that might be argued out of the definitions given by the lexicographers *(See Record, p. 11)*.

Argument for the Appellee the United Verde Copper Company.

FIRST POINT.—The acts of the Defendant come well within the permissive provisions of section 24 of the Act of June 3, 1878, Chapter 150.

First.—The language of the act stated.

The relevant portion of the act in question is as follows:

> "*Sec. 1.* Be it enacted, &c., That all citizens of the "United States and other persons, *bona fide* resi- "dents of the State of Colorado, or Nevada, or either "of the Territories of New Mexico, Arizona, Utah,

"Wyoming, Dakota, Idaho, or Montana, and all other "mineral districts of the United States, shall be, and "are hereby authorized and permitted to fell and re- "move, *for building, agricultural, mining, or other "domestic purposes,* any timber or other trees grow- "ing or being on the public lands, said lands being "mineral, and not subject to entry under existing "laws of the United States, except for mineral entry, "in either of said States, Territories, or districts of "which such citizens or persons may be at the time "bona fide residents, subject to such rules and regu- "lations as the Secretary of the Interior may pre- "scribe for the protection of the timber and of the "undergrowth growing upon such lands, and for "other purposes: *Provided,* the provisions of this "act shall not extend to railroad corporations."

The appellee claims and it was decided below, that roasting ore comes within the definition of the mining purposes intended by the Act; also that "domestic" purposes as therein stated means "local" purposes and therefore that the process of roasting ores if not included in the mining purposes referred to is included in the "domestic purposes" for which timber may lawfully be used.

Second.—The phrase "domestic purposes" in the Act means the same as "local purposes."

We agree with counsel for the appellant that the word *"domestic"* standing alone is susceptible of four meanings, two of which are possible here, viz.: *"local"* and *"household."* It is now urged by the United States that it is not here used in the sense of *"local,"* but rather in the sense of "household." But this construction is erroneous. The phrase *"domestic purposes"* in the Act

means *local purposes.* That is to say it not only adds to the preceding words "building, agricultural, mining," but it also qualifies them. The purposes to be lawful must be *domestic,* that is *local.* The timber cannot be removed beyond the State or Territory where found.

Unless this was the intent and unless the word "*domestic*" was used in the sense of "*local,*" the Act would have authorized the use of the timber in question for building, agricultural, mining or household purposes anywhere and therefore the removal from the territory of such timber, which of course was never intended by Congress.

The phrase "in either of said States, Territories or Districts of which such citizens or persons may be at the time *bona fide* residents," does not refer to the use, but merely to the cutting, and that phrase is merely descriptive of the *place* where the timber may be cut.

To make this perfectly clear omit the phrase "said "lands being mineral and not subject to entry under ex- "isting laws of the United States except in mineral en- "try," which might well have been enclosed in a parenthesis and then the statute will read omitting parenthetic matter:—

> "That all citizens, &c., shall be, and are hereby "authorized and permitted to fell and remove, *for "building, agricultural, mining, or other domestic "purposes,* any timber or other trees growing or be- "ing on the public lands, in either of said States, Ter- "ritories, or Districts of which such citizens or per- "sons may be at the time *bona fide* residents, subject "&c."

The Act therefore means to provide, in substance, that *bona fide* residents of said States, Territories or Districts may fell and remove the timber referred to for local pur-

poses, whether building, agricultural, mining or other similar purposes, and the word "domestic" must mean "local," otherwise there is nothing in the Act limiting the use to local purposes as was necessarily intended by Congress.

The appellant's substitution of the word "household" for the word "domestic" would totally eliminate the word "other" from the Statutes. You may say building, agricultural, mining or household purposes, but you cannot rationally say "building, agricultural, mining, or *other household* purposes. But there is no authority for the elimination of the word "other," which would be contrary to well established rules.

On the other hand by construing the word "domestic" as meaning "local" we have an act permitting the use of this timber for the general purpose of building up the respective Territories by aiding mining, agriculture and home building, a natural and salutary law. A comparison of the statute is given below with the word "local" substituted for "domestic" in the one case and "household" for "domestic" in the other case. From this it is seen how clear and logical is the first construction, and how contradictory and meaningless is the second.

> All citizens, &c., "shall be * * * permitted to "fell and remove for building, agricultural, mining, "or other local purposes, any timber, etc."

> All citizens, &c., "shall be * * * permitted to "fell and remove for building, agricultural, mining "or *other* household purposes, any timber, etc."

The criticism of the appellant that the use of word "*domestic*" meaning "*local*" would involve an unnecessary repetition, is without force. It is usual in this

Act as in others to specify principal cases and then use a comprehensive and qualifying word to limit and control them. Thus we have elsewhere in this Act the expression "All citizens of the United States and other persons *bona fide* residents, &c.," and other similar instances. In like manner we may say, "for military, naval and *other* warlike purposes;" or an authority may be given to make "notes, due bills or *other* promises to pay;" or we may say for medical, surgical or *other* sanitary purposes, meaning other similar warlike purposes; other similar promises to pay; other similar sanitary purposes respectively. In each case the last adjective comprehends and qualifies the others. Here what was meant in the Act was building, agricultural, mining or other *similar* domestic (local) purposes.

Another consideration showing that the word "domestic" in the Act means "local" and not "household" is found in the concluding words of the section, as follows:

> "*Provided* the provisions of this Act shall not ex-
> "tend to railroad corporations."

This restriction was obviously intended to prevent the taking of timber for railroad ties and fuel. At the time this Act was passed June 3rd, 1878, but a few miles of railways had been constructed in the States and Territories mentioned in the Act. Charters, however, had been granted for several great trans-territorial railroads, namely, the Northern Pacific running the length of Montana, the Texas Pacific and Atlantic Pacific across New Mexico and Arizona, and many others in the construction of which a vast amount of timber would be necessary. It it further to be remembered that at that time many locomotives were wood burners. It was evidently to prevent

this enormous use of timber for ties and fuel by railroads that this provision in the Act was inserted. But why was it necessary to except railroads from the language of the Act unless the word "domestic" meant "local?" Railroads were certainly not likely to use timber for building, agricultural, mining or household purposes to any appreciable extent, whereas the use of timber for ties or fuel in locomotives might be construed as a *local* use were it not for this exception in the Act.

Third.—Prior judicial constructions of the meaning of the word domestic.

The only judicial constructions of the statute in question uphold the defendant's contention.

In *United States* v. *Richmond Mining Co.*, 40 Fed. Rep., 415, U. S. C. C. Nev. (1889), the identical statute here in question was under consideration and it was there held that the words "other domestic purposes" were equivalent to "other domestic industries" and included processes connected with mining.

The Court says: (SABINE, *J.*:)

> "It is urged with some earnestness that, as it is "shown that this wood and coal were to be used in "the reduction of ores and refining the product there- "of, such a use is not a mining use properly; that "reducing ores by mill or furnace process, and re- "fining the bullion, is not a part of mining. * * * "In a very restricted sense it may be true that min- "ing is limited to the breaking down or digging up "of ore in place. * * * But not to dwell upon "this point we may concede that reducing ores and "refining the product may not be strictly mining.

"Still this business by itself is a domestic industry "of the highest importance to the miner and to the "public. * * * The miner is not the only person "benefitted by the statute. It applies to all alike "who use this wood or timber for *domestic or local* "use within the State. And it matters not whether "such reduction works, mills or furnaces are engaged "in reducing ores from mines owned by the propri- "etors of the works, or are engaged in reducing pur- "chased ores, or in what is usually called 'custom "'work,' for pay, toll, or tribute from the owner of "the ores reduced. All industries within the State, "not prohibited from such use, are within the pro- "tection of the statute."

The decision in this Nevada case is broad enough to include smelting or reducing purchased ores which is much farther than the appellee asks the Court to go in this case.

In *United States* v. *Copper Queen Consolidated Mining Co.*, 185 U. S., 495, the facts were almost identical with those of the case at bar. It seemed to have been conceded in the Court below that the use of the wood for smelting purposes was lawful, and the sole point at issue was the question of whether Ross who cut the timber, was a citizen and resident. The jury found in favor of the defendant and the plaintiff appealed to the Supreme Court on the ground that there was no evidence that Ross was a citizen. The judgment was affirmed without considering other questions, but at page 497, Judge Peckham, who delivered the opinion, says:

"The verdict must be regarded as a finding that "Ross was a citizen of the United States and a *bona* "*fide* resident of the Territory when the cutting was "done. If he were, there is no question made about "his right to cut."

There was no intimation in the opinion that any error had been committed by the Court below in its construction of the statute.

Fourth.—Answer to Appellants references to the title of this Act and to other Acts of Congress on the question of construction.

The appellant's Counsel refers to the title of the Act in support of his claim that the word "domestic" there means "belonging to the household." But thus used it would be imperfect and misleading. Building and agricultural purposes may be "local" but they cannot be considered "household" purposes.

Counsel for the appellant, calls the attention of the Court to the Act of April 30, 1878, passed a few weeks before the Act under consideration here, and which reads in part as follows:

> "If any timber cut on the public lands shall be exported from the Territories of the United States it shall be liable to seizure by United States authority wherever found."

The argument sought to be based on this Act is that as it in terms limited the use of timber to the locality where cut, it was unnecessary in the subsequent Act of June 3, 1878, to so limit such use and therefore Congress could not have intended to do so, and therefore it is further urged that the word "domestic" in the Act before us cannot mean "local." But these two Acts cover different subjects. The Act of April is prohibitive and forbids export from the Territories only and not merely from one Territory to another; and the Act of June 3rd, 1878, was

permissive, and permits use within the State or Territory. The policy of both is the same. In both cases the domestic or local use is permitted and the export is forbidden. To encourage local use and not merely use for household purposes was what was in the mind of Congress in both cases.

Reference is also made by the appellant to Section 8 of the Act of March 3rd, 1891, entitled "An Act to Repeal "Timber Culture Laws and for other Purposes."

It is conceded by the Appellant that this statute has no direct application to the case at bar, but he cites it merely as an instance where the word "domestic" is claimed to have been used in the sense of the word "household" in a timber Act. The construction of this Act of 1891, is no more authoritative in dealing with the construction of the Act of 1878, than the construction of the latter Act would be in dealing with the former. But this much is evident that by the inclusion of the word "manufacture" in the Act of 1891, Congress emphasized the policy of a liberal use of government timber lands for the development of the Territories and States referred to.

Other instances might be quoted where the use of the word "domestic" seems to have been loosely made, probably copied from other similar Acts without much close scrutiny of its real meaning or application. Such instances have no relevancy here, and, moreover, in every one of such Acts there is more difficulty with the narrow construction of the word as meaning "household" than there would be with the construction contended for here.

Fifth.—The roasting of ore is a mining purpose within the meaning of the Act.

The statute permits the use of timber for mining purposes. The language is: "For building, agricultural, mining, or other domestic purposes." The timber may be used not only for mining but for *purposes* connected with mining. We respectfully insist that such purposes include the roasting of ore by the defendant which is made the basis of this action.

What is mining? Webster defines the verb "to mine" "To get ore metals, coal or precious stones out of the "earth." In a broad sense it must mean separating ore or metal from the earth. The roasting of ore is certainly a purpose connected with mining as thus defined and having the same object. It is a part of the system of mining carried on by the appellee at its mines at Jerome, Arizona. The ore is extracted from the mines and carried to the roasting dump adjoining, where the process of roasting consists merely in the application of fire to the ore and separating therefrom the sulphur, arsenic and other volatile substances. It is the continuation of the work of the miner with the pick. The separation of the ore from the other substances which are found with it is not fully completed by the work of the miner in the mine itself and has to be finished by the process of roasting outside the mine. It is therefore not necessary here to discuss the process of smelting the ore, which is a subsequent and entirely different process.

The *Encyclopedia Brittanica* in its article on Mining, defines the term and its use of it as follows:

> "The art of mining consists of those processes by "which useful minerals are obtained from the earth's

"crust. This definition is wider than what is popu-
"larly known as 'mining,' for it includes not only
"underground excavations, but also open workings.
"* * * *Furthermore as it is customary for a miner*
"to cleanse his ore to a greater or less extent before
"selling it to the smelter, we have under the head of
"mining, included those processes which are com-
"monly known as the dressing or mechanical prep-
"aration of ores."

The roasting complained of here was a mechanical preparation of the ore prior to smelting it and the definition of mining given above, considered broadly, will therefore include roasting, though the process itself is not specifically referred to anywhere in the Article.

Sixth.—Consideration of conditions at the time the Act was passed.

A glance at the conditions existing at the time of the passage of the Act strengthens the argument in favor of the construction claimed by the appellee. At the time the States and Territories in question were only partially explored, little known and but sparsely settled; their immense mineral wealth was suspected or known, but almost wholly undeveloped. The mines were few and primitive. The use of timber therein for shafting and shoring only would hardly be worth considering. Congress intended by the Act of 1878 to give to the inhabitants of the various States and Territories a general use of the timber upon the mining lands in order to stimulate the growth and prosperity of those regions. That this would not have entailed any great waste of material is easily seen by a reference to the population and industrial conditions of

said States and Territories. The census of 1870 gave the population of Arizona as 9,658, New Mexico 91,870, Montana 20,595, Colorado 34,000, and Wyoming 9,118. In Arizona this would show a density of population of one person to every ten square miles. Manufactures on a large scale were unknown and even the most limited manufacturing operations were few. The timber in those sections was considered of little value, and the lack of transportation facilities limited to a very small area the use of it. And even as late as 1891 and after these States and Territories had increased enormously in population and in transportation facilities, Congress by the Act of March 3, 1891, granted them a free local use of the public timber, including manufacturing purposes and even extended it to other regions.

Seventh.—This is a remedial statute and should be liberally construed in favor of the citizen.

The Attorney General contends that the Statute of 1878 should be strictly construed in favor of the Government; that is to say against the mine owners and cites *Endlich* (Sec. 354) and other authorities covering instances of grants to individuals and corporations, to the effect that acts conferring special privileges are to be so construed. The principle is conceded and its reason obvious, but this is not such a case. This is a case of a remedial statute which should be liberally construed to effect the end proposed, namely, the development of the regions referred to in the Act. Is this Act to be construed strictly against the agriculturalists, builders, miners, manufacturers and others on the ground that it invests them with special privileges? Were all these farmers, miners, builders, &c., mo-

nopolists? Were they, as the Attorney General seems to insinuate by his citation from Endlich, promoters who obtained the Act on their petition? Not at all. They constituted practically the whole population, and the beneficent grant of Congress was conferred on all on equal and just terms.

Eighth.—Light thrown by the Act of 1891 on the construction of this Act.

Endlich further states, however, (Sec. 354) that where a statute is doubtful a "familiar principle of statutory "interpretation requires the construction to be such as "will make it accord with subsequent legislation."

Now here we find that by the Act of March 3, 1891, Chap. 561, Sec. 8, a free use of timber is permitted within the Territories included in the Act in question and others in addition, for "agricultural, mining, *manufacturing* or "domestic purposes" within the State or Territory in which it is cut. Since the appellant claims that roasting ore is not mining it must be manufacturing which was in terms permitted by the Act of 1891, and on the principle of construction above stated by Endlich, may be supposed to have been intended by the Act of 1878.

Ninth.—The report of the Senate Committee in charge of the Bill shows its remedial nature.

The Act of June 3, 1878, was originally known as Senate Bill No. 20 and was passed by the Forty-fifth Congress. The material part of the report of the Senate Committee is as follows:

"The committee have carefully considered the sub-
"ject of timber and timber lands and after mature
"deliberation with a view of devising the best method
"of preserving, cultivating and disposing of the
"same, have come to the conclusion that a distinc-
"tion should be made between such trees as grow
"upon mountains in the mineral districts, and the
"forest, pine, oak and other timber that grow in
"the more level portions of the country. While the
"lumber of the latter is a regular and important
"article of commerce and is constantly being cut and
"transported in large quantities to ready markets,
"the character of the former renders the timber
"unfit except for mining purposes. Even, were this
"otherwise, it is usually found in such inaccessible
"places as to preclude its transportation to market,
"consequently it is used by the prospector, the miner,
"and other members of mining communities for
"domestic and other practical purposes incidental
"to the development of mineral districts. The com-
"mittee do not believe that it would be wise policy
"on the part of the government to seek to profit di-
"rectly by the sale of this kind of timber nor to tax
"the pioneer by compelling him to purchase it. Ex-
"cept as a source of revenue by the sale to the settler
"it can never be of any value to the government.
"Should the experiment be tried of requiring pay-
"ment for it, it would be found that the cost of keep-
"ing agents for its sale and officers to prevent or
"punish infractions of the law at remote and widely-
"separated settlements, would largely consume all
"sums received for this timber by the government.
"Thus, while it is practically of but little value to
"the government, it is essential to the settler and
"indispensable to his occupation and development
"of the mineral lands. It has been the custom of
"Congress to encourage the exploration and develop-
"ment of the mineral regions of the United States;

"and in this connection it should be borne in mind "that it is mainly to the indomitable energy, hardi- "hood and daring of the pioneer that we are indebted "for the discovery of the rich gold and silver dis- "tricts of the country."

SECOND POINT.—The Seventh Regulation of the Department of the Interior did not make unlawful the acts of the Defendant complained of.

First.—As to the interpretation of the rule:

Section 7 of these rules provides:

"No timber is permitted to be used for smelting "purposes, smelting being a separate and distinct "industry from that of mining."

Of course it will not be claimed that the Secretary had authority to legislate or to overrule the Act of Congress or had any intention to do so. The inhabitants of those regions were granted by Congress the absolute right to fell and remove timber, etc., for mining or other domestic purposes—

"subject to such rules and regulations as the Sec- "retary of the Interior may prescribe for the protec- "tion of the timber and of the undergrowth growing "upon such lands; and for other purposes."

If therefore roasting ore be a mining purpose the Secretary could not prohibit it. He could only regulate it. And it is to be presumed that he attempted no more than that. In fact he merely attempted to state or define his

understanding of the meaning of the law. He said that smelting is a separate and distinct industry from that of mining, and therefore declared that it was not within the purview of the Act. He did not forbid the use of timber for roasting the ore. He did not say that such roasting was not within the permission of the Act. Nor did he apparently forbid private smelting when performed as an adjunct of mining, but only when carried on as a separate industry with which of course we have nothing to do here. Obviously the question whether *roasting* is part of the process of mining referred to in the Act is quite unaffected by the Secretary's definition of *smelting* as found in Rule Seven. If roasting be in fact a mining process then the Secretary could not prohibit it and presumably never intended to do so. The rule therefore is to be interpreted as not including the roasting of ore in its prohibition of smelting.

The difference between roasting and smelting is not merely technical but substantial. In smelting a chemical change in the ore itself is produced; in roasting there is no such process or result. Smelting includes fusion; roasting does not.

Some of the accepted definitions of smelting and roasting are as follows:

> WEBSTER.—"*Smelt.* To melt or fuse as ore for the "purpose of separating the metal from extraneous "substances."
>
> WEBSTER.—"*Roast.* To dissipate by heat the vola- "tile part of, as ores."
>
> WORCESTER.—*Smelt.* Same as Webster.
>
> WORCESTER.—"*Roast.* To expel volatile matter "from by exposing to heat, as ores."

Appellant quotes at large from the Standard Dictionary, which, however, was not published until 1895, seventeen years after the Act under consideration. The definitions there are as follows:

> STANDARD.—"*Smelt.* To obtain (a metal) from the "ore by a process that *includes fusion;* also, in a "more limited sense, to reduce (ores, sweepings, met- "allurgical products, etc.) by fusion in a furnace."
>
> "In its restricted sense smelting is confined to a "single operation, as the fusion of an iron ore in a "shaft furnace, the reduction of a copper matte in "a reverbatory furnace, and the extraction of a metal "from sweepings in a crucible, but in its general "sense it includes the entire treatment of the material "from the crude ore to the finished metal, and em- "braces (1) the calcination or roasting by means of "which the sulphur and other volatile constituents "are expelled (2) the reduction of the resulting "products in a furnace or the smelting proper, and "(3) the refining of the product from the second op- "eration."

> STANDARD.—"*Roast.* (The only definition applica- "ble here) To heat highly (metallic ores) with access "of air but *without fusing* for the purpose of driving "off or volatilizing impurities or for oxidizing "them."

In the present case the Court took judicial notice of the process of roasting as practiced in Arizona, and describing it said that it consisted of piling ore mixed with wood in the open air and igniting the wood, whereupon the sulphur and other combustible and volatile substances mixed with the ore were ignited and consumed or driven off in gas. This definition is controlling in this case.

In this process of roasting ore a material part, if not the

greater part of the necessary heat is supplied by the combustion of the materials themselves. No chemical change takes place in the metal; the burning produces a chemical change in the substance consumed but none in the metal. Free sulphur or sulphur in combination with other substances is separated from the metal, a separation which might be accomplished, though less satisfactorily by other mechanical means, such as washing or scraping.

On the contrary in smelting, the change is mainly a chemical one and thereby metals in chemical and mechanical combination with foreign substances are reduced to the molten state whereupon other substances called fluxes are artificially introduced into the mass, or brought into contact with it. These fluxes have a greater chemical affinity for these foreign substances than the metals themselves have. In this way the metal is freed from the foreign elements which then unite with the fluxes (*Encyclopedia Brit.,—Copper*). Such is the process of smelting, which is therefore radically different from the process of roasting as above defined, and manifestly the roasting processes of the defendant came neither within the letter nor the spirit of the rule of the Department of the Interior, forbidding the use of the timber in question for smelting purposes.

Second.—As to the validity of the regulation of the Secretary of the Interior.

Assuming for argument's sake that as claimed by the appellant the term smelting includes roasting and that roasting ore is within the prohibition of the regulation, it is submitted that the regulation to that extent is invalid.

It is out of the question to say that the Secretary can *construe or interpret* the Act. That is for the Courts to do. Nor is it claimed by the appellant that the Secretary may lawfully abridge or limit the rights of citizens to the use of the timber granted by the Act unless the Act itself confers that power. But this the Act does not do. We do not deny the power of Congress to clothe an executive officer with power to issue licenses, etc. in proper cases. But in the present instance Congress gave no such power. The Secretary was merely authorized to regulate the use of the privilege which was freely given to all the people of the Territory.

The appellant argues (Brief, p. 6) that Congress has authority "to grant a privilege or license and clothe an "executive officer with the right to grant or refuse or re- "strict such permission, etc." True, Congress might possibly have done so here, but did not see fit. The Act does not say that the Secretary may license the cutting of timber, but that "*All citizens, etc. shall be and are* hereby "authorized and permitted to fell and remove, etc., any "timber or tress, etc."

Nor does this record present any instance of matters unforeseen or equities not anticipated, such as the Court referred to in the *Williams* case (12 Pac., 851) in the language cited by the Attorney General (*Brief, p. 7*). In that case the regulation was a reasonable one for the protection of the undergrowth. It did not curtail the privileges granted by the Act but was intended to protect and conserve them.

Third.—Discussion of authorities cited by Appellant on this subject.

The other cases cited on this point by the appellant do not go further. *Re Kollock* (165 U. S., 526) was an oleomargarine case. The regulation required certain marks on packages, etc. The Court said:

> "The regulation is in execution of or supplemen-
> "tary to but not in conflict with the law itself, and
> "is specifically authorized thereby in effectuation of
> "legislation."

In *Field* v. *Clark*, 143 U. S., 649; *Caha* v. *United States*, 152 U. S., 211; *re Kollock*, 165 U. S., 526; *United States* v. *Ormsbee*, 74 Fed. Rep. 207; *United States* v. *Moline*, 82 Fed. Rep., 592, all cited by the appellant the acts performed by the officers in question were ministerial acts done in express conformity with the direction of the Acts of Congress respectively. The acts of said officers under such circumstances were all sustained.

The other citations of the appellant on this point are of similar character.

The power in any official to construe or regulate an Act of Congress so as to curtail or nullify its effect has never been sustained by this Court. The power to make rules and regulations in this as in all similar cases is limited to such rules as will aid and facilitate the operation of the Act, not such as will defeat or impede it.

Fourth.—Meaning of the phrase "for other purposes."

The Attorney General lays stress (*Brief p. 7*) on the phrase "and for other purposes" in Setcion 1 of the Act, which provides that the use of the timber is to be "subject

"to such rules and regulations as the Secretary of In-"terior may prescribe for the protection of the timber "and the undergrowth growing upon such lands *and for "other purposes,"* and says that thereby "the latitude "given to the Secretary would seem to be unlimited." What these other purposes are is not at once apparent; but they must certainly be lawful purposes; they must not be purposes hostile to the intent of the Act. Under that provision rules might possibly be made to regulate rival claims; to prevent forest fires; to obtain reports of timber cut, or any other matter of mere detail, but not to prevent or limit the use of the timber for mining purposes.

We concede that counsel for the appellant is right when he says that the logical result of his argument is to clothe the Secretary of the Interior with arbitrary power in this matter, but we deny that such a conclusion is justified. He says that the Secretary "is constituted the arbiter, "and that any limitation he may prescribe short of an "absolute suspension of the right, has the force of law "under the terms of this Act" (*Brief p. 11*). Accordingly he might say that smelting is not mining; that roasting is not mining; that shoring the mine walls is not mining; that this and that use is not agricultural; and unreasonably limit the seasons for cutting timber and thus practically nullify the Act as long as in form he did not absolutely suspend it. Such is the logical effect of the Attorney General's argument here. It seems to us to carry with it its own refutation.

Fifth.—The argument of contemporary construction.

The Attorney General cites numerous cases on page eleven of his brief to sustain the proposition that the

contemporaneous construction of an Act of Congress by those charged with its execution should not be disregarded by the judiciary unless the construction be clearly wrong and seeks by this argument to sustain the rules of the Department of the Interior. Most of the cases thus cited by the appellant state that where a contemporaneous interpretation has been given to a statute and it has been acted upon for years in accordance therewith, it will be followed if possible. But the rule in question was not issued contemporaneously with the passage of the Act. The Act was passed in 1878, and the rule was not promulgated until 1900. In the meantime no attempt had been made to limit the operation of the Act in any such way. In the year 1889, *United States* v. *Richmond Mining Co.*, 40 Fed. Rep., 415, was decided and a construction favorable to the appellee given the Act by the Supreme Court of Nevada. This case was never reviewed in this Court, and the construction there established was never seriously questioned till now. This appears from the case of *United States* v. *Copper Queen Consolidated Mining Co.*, 185 U. S., 495, where it was assumed by both sides that the Act was to be liberally construed in favor of the citizen and where this Court in dismissing the appeal on another point says (p. 497):

> "If he were (a citizen) there is no question made "about his right to cut."

The cases of *Pennoyer* v. *McConnaughy*, 140 U. S., 1; *United States* v. *Hill*, 120 U. S., 169; and *United States* v. *Philbrick*, 120 U. S., 52; *United States* v. *Johnston*, 124 U. S., 236; *Heath* v. *Wallace*, 138 U. S., 573 cited by the appellant on the point that the construction of the Department should control, differ from this case. Each of

those appeals presented instances of a long and well-established rule of construction or practice in doubtful cases, where no injustice or harm would follow its adoption. There was no attempt in any of these cases to nullify or restrict the operation of a remedial Act of Congress.

Sixth.—The penal clause in the Act.

The appellant refers to Section 3 of the Act providing that persons violating its provisions or the rules and regulations made in pursuance thereof shall be guilty of a misdemeanor. This only illustrates all the more forcibly our claim that the rule if it seriously restricts the operation of the Act is a nullity. It surely was not intended to say in the Act that citizens "shall be and are "hereby authorized" to use timber for mining purposes and then punish them for doing so under the same Act. In other words, the Secretary cannot enact and repeal criminal laws; he cannot create misdemeanors. His regulations to be lawful must be in *pursuance* of the Act, that is following it, in furtherance of its objects, not practically suspending it.

In conclusion.—The appellant's counsel asks that the judgment be reversed because he questions the policy of allowing the use of the timber on these mineral lands to the extent and for the purposes permitted by the Act. He says that the mountains of the region affected will be denuded and other evils follow if the present policy is persisted in. The facts to justify these conclusions are not before us, nor is this Court the proper body to pass

upon those facts. If they are as alleged the remedy is with Congress.

It is respectfully submitted that the judgment of the Supreme Court of Arizona is right and should be affirmed.

Dated, Washington, D. C., October Term, 1904.

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Appellee.